Supreme Court, U.S.
FILED
MAY 30 1995
OFFICE OF THE CLERK

NO. 94-1612

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

---

**STATE OF MICHIGAN,**

PETITIONER,

vs.

**RODNEY BELLEW,**

RESPONDENT.

---

PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

---

# BRIEF FOR RESPONDENT

WALTER POOKRUM
Counsel of Record
645 Griswold, Suite 384
Detroit, MI 48226
313/ 222-0323

## QUESTION PRESENTED

IN RULING THAT A THIRD TRIAL WAS BARRED BY DOUBLE JEOPARDY BECAUSE A MANIFEST NECESSITY DID NOT EXIST FOR ABORTING THE SECOND BENCH TRIAL, DID THE MICHIGAN SUPREME COURT ACCORD A SCOPE TO THE MANIFEST NECESSITY EXCEPTION TO THE DOUBLE JEOPARDY BAR WHICH LED TO A RESULT WHICH MERITS THE GRANT OF A WRIT OF CERTIORARI WHERE: PETITIONER'S MOTION FOR THE TRIAL JUDGE TO RECUSE HERSELF PRECIPITATED THE MISTRIAL; PETITIONER ASSENTED TO THE DECLARATION OF MISTRIAL; THE STATE COURTS FOUND THAT RESPONDENT HAD NOT CONSENTED TO THE MISTRIAL; AND NEITHER THE INITIAL JUDGE NOR THE SUCCESSOR JUDGE, TO WHOM THE CASE WAS REFERRED AFTER THE RECUSAL, CONSIDERED WHETHER THERE EXISTED REASONABLE ALTERNATIVES TO THE MISTRIAL?

## LIST OF PARTIES

RODNEY D. BELLEW
Defendant/Appellee

TYRONE HICKS
Defendant/Appellee

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff/Appellant

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | 1 |
| List of Parties | 1 |
| Table of Authorities | 3 |
| Constitutional Provisions | 3 |
| Statement of the Case | 3 |
| Summary of Argument | 7 |
| Argument | 8 |
| Conclusion | 12 |


## TABLE OF AUTHORITIES


Arizona v. Washington,
434 U.S. 497; 98 S.Ct. 824; 54 L.Ed. 2d 717 (1978) . 9

Illinois v. Somerville,
410 U.S. 458; 35 L.Ed. 2d 425; 98 S.Ct. 824 (1978) . 10

United States v. Dinitz,
424 U.S. 600; 96 S.Ct. 1075; 47 L.Ed. 2d 267 (1976) . . 8

United States V. Jorn,
400 U.S. 470; 91 S.Ct. 547; 27 L.Ed. 2d 543 (1971) . 9

United States v. Perez,
22 U.S. (9 Wheat.) 579; 6 L.Ed. 165 (1824) . . . . . 8

United States v. Sartori,
730 F.2d 973 (Fourth Circuit, 1984) . . . . . 9

Wade v. Hunter,
336 U.S. 684, 69 S.Ct. 834; 93 L.Ed. 974 (1949) . . . 11

## CONSTITUTIONAL PROVISIONS

Mich. Const. 1963, art.1, sec. 15 (in pertinent part):

> No person shall be subject for the same offense to be twice put in jeopardy

United States Constitution, amend. 14 (in pertinent part):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States

## STATEMENT OF THE CASE

There are several misstatements of fact which appear in the petition for certiorari.

1. In the "Statement of the Questions Presented," petitioner states:

> Did the Michigan Supreme Court misconstrue precedent from this Court in holding that a finding of manifest necessity is required <u>despite</u> defense consent to a mistrial where the defense motivation for consenting to the mistrial is action by the trial court. . . .

Petitioner has presented the question in a manner which is contrary to the findings of the Detroit Recorder's (trial) Court, the Michigan Court of Appeals, and the Michigan Supreme Court. All three courts found that respondent had <u>not</u> consented to the mistrial.

The language of the opinion of the Michigan Supreme Court makes the point best:

> We cannot conclude that the defendant [in either case] consented to the mistrial. Both defendants adamantly opposed [the trial judge's] decision to recuse herself and expressed [their] desire to continue with the chosen factfinder. Accordingly, consent cannot be derived from defendant['s] actions surrounding [the judge's] recusal . . . .
>
> . . . .
>
> Moreover, in Bellew, we believe it would be patently unfair to construe defendant's motion for declaration of mistrial and for dismissal as consent to the mistrial, in light of defendant's vigorous objection to [the trial judge's] recusal. Defendant's motion evidenced his belief that the functional equivalent of a mistrial had occurred upon [the trial judge's] recusal. Although we reject this view today, we decline to transform defendant's attempted clarification of the recusal into consent for a mistrial occasioned by an event outside of defendant's control.
>
> Opinion of the Michigan Supreme Court, appended to Petition, at 28a and 32-34a (emphasis added) and 30a, n.21.

Although petitioner indicates later in the question presented that respondent did not consent to the initial recusal, the language of the question as presented by petitioner could lead a reader to the mistaken conclusion that respondent had somehow requested the mistrial when, in fact, respondent had merely requested that what he believed was a mistrial be called a mistrial and treated as a mistrial. Id., at 28a, n.19.

2. Regarding the "Constitutional Provisions Involved," Petition, at 8: Technically, the fourteenth amendment of the United States Constitution, through which the fifth amendment is applied to the states, and the double jeopardy provision of the

Michigan Constitution, derived from the federal constitution, also apply in these circumstances.

3. Regarding the "Statement of the Case," petitioner states that "the prosecutor dismissed three of the four Receiving and Concealing Stolen Property counts, and the Chop Shop count. . . ." Petition, at 9.

In fact, the prosecutor dismissed the three Receiving and Concealing counts, but failed even to mention the Chop Shop count (Count 9). Brief for Respondent, at 1A and 2A.

4. Petitioner states that "[t]he trial court ultimately granted the defendant's motion for a new trial. . . ." Petition, at 9. In fact, the court granted the motion as to Count 1, but denied it as to Counts 5 - 8. Brief for Respondent, at 3A.

5. Petitioner states that "the prosecutor learned of a business arrangement between defense counsel. . . and the judge's husband. . . The extent of the arrangement was unknown, [but] it became evident that the two shared a common office, common fax number, and a receptionist." Petition, at 10.

The most petitioner can logically assert is it was "evident" that at some point in time, the two attorneys had the same office address and fax number; and someone who answered at the judge's husband's telephone number said she would take a message for

defense counsel. None of this necessarily constitutes a "business arrangement," especially in these days of professional office suites, which underscored the need for the evidentiary hearing requested by defense counsel.

6. Petitioner quotes the trial prosecutor as having said that defense counsel, in turn, told the successor judge that he "had to grant a mistrial and assign [the case] for trial."

Respondent does not have a transcript of the proceedings before the successor judge and therefore cannot prove what was said there. He denies, however, that defense counsel requested that the case be assigned for trial, and submits that it is clear from other portions of the case that counsel requested that the matter be reassigned for sentencing on the counts of which defendant was convicted. Id., at 28a, n.19.

7. Petitioner writes that the Michigan Court of Appeals found that "jeopardy has attached, thus barring retrial." Id., at 15.

The Michigan Court of Appeals held that, because jeopardy had attached and the mistrial was declared without manifest necessity, double jeopardy barred retrial. Brief for Respondent, at 4A and 5A.

8. Petitioner writes that "the majority opinion did not

recognize that the defendant consented to the mistrial." Petition, at 16.

Respondent has made the point previously that three Michigan courts have found that respondent did not consent to the mistrial. See Petition, at 30a, n.21.

## SUMMARY OF ARGUMENT

The Michigan Supreme Court opinion regarding this double jeopardy issue differs from well-settled precedent of the United States Supreme Court only in the respects that:

1) The Michigan court extended to a successor judge, following what the state court found was, in effect, the "disability" of the initial trial judge, the requirement of determining manifest necessity before a mistrial is declared.

Previous U. S. Supreme Court cases have thus far applied the manifest necessity determination to initial trial judges, but apparently only because the Court has never ruled in a case in which the initial trial judge became "disabled."

2) The Michigan court tacitly approved of the practice of assigning the case to a successor judge, even though the initial judge did not make a record sufficient to support her recusal, and even though the U. S. Supreme Court has ruled that a defendant has the "valued right" to have his trial completed by a particular tribunal.

Because the result in the state courts was fair under the law and the circumstances, however, and because the manifest necessity determination is especially fact-based, review by this Court is not warranted.

## ARGUMENT

Petitioner argues that the Michigan Supreme Court has misconstrued double jeopardy decisions of this Court in resolving the case at issue. This is simply not so.

In reviewing the settled precedent of the United States Supreme Court, the Michigan Supreme Court observed and followed the rule that double jeopardy does not bar retrial where the defendant has consented to the mistrial, United States v. Dinitz, 424 U.S. 600, 607; 96 S.Ct. 1075; 47 L.Ed. 2d (1976), or where there is a manifest necessity for the mistrial. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580; 6 L.Ed. 165 (1824).

Petitioner repeatedly insists that respondent consented to the mistrial. All three Michigan courts which addressed the issue, however, including the Michigan Supreme Court, found that respondent did not consent. That left for consideration the question whether there was a manifest necessity for the mistrial which occurred in the trial court.

The United States Supreme Court has also consistently ruled

that there are no mechanical rules or bright-line tests for defining manifest necessity, "explicitly [declining] the invitation of litigants to formulate rules based on categories of circumstances which will permit or preclude retrial." United States v. Jorn, 400 U.S. 470, 480; 91 S.Ct. 547, 555 (1971).

In the terminology of the Michigan Supreme Court, the issue in the instant case involves the "scope of the manifest necessity exception to the double jeopardy bar and its application to the particular facts presented." Petition, at 12a (emphasis added). In essence, the Michigan Supreme Court ruled that in order for a judge to find that the necessity of declaring a mistrial is manifest, which finding would ordinarily allow the state to re-try the defendant, the judge must exhaust all options and alternatives to the mistrial. See United States v. Sartori, 730 F.2d 973 (Fourth Circuit, 1984).

This is an established precept. The novel aspect of this case, however, is that this deliberative-procedure requirement was applied to a judge who inherited the case after the judge who initially had it recused herself in response to petitioner's improvident motion. This is what the Michigan Supreme Court referred to by the "scope" of the manifest necessity exception.

If this ruling runs contrary to United States Supreme Court precedent, it does so in this aspect only. See Arizona v.

Washington, 424 U.S. 497; 54 L.Ed. 2d 717; 98 S.Ct. 824 (1978).

Respondent takes issue with this aspect of the ruling, having continually expressed his position that the functional equivalent of a mistrial occurred when the initial trial judge granted petitioner's motion, and that the mistrial was granted in the absence of manifest necessity.

The Michigan Supreme Court rejected this view, see Petition, at 34a; but it affirmed the dismissal on double jeopardy grounds because the successor judge did not determine that there was manifest necessity for the dismissal to which the prosecutor assented. Otherwise, the respondent here would be the petitioner in this Court, because respondent submits that Chief Judge Cavanaugh's opinion presents the correct state of the law on this issue.

Therefore, although respondent concedes that that majority opinion is incorrect in its determination of the scope of the manifest necessity rule, it is correct in its analysis of the procedure by which manifest necessity is to be determined and, on the facts of this case, correct in its result.

If there is one thing which is clear from United States Supreme Court precedent, it is that the manifest necessity determination is inextricably tied to the particular facts of the case. Illinois v. Somerville, 410 U.S. 458; 35 L.Ed. 2d 425; 93

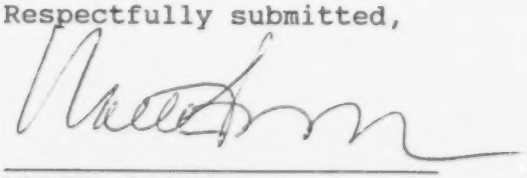
S.Ct. 1066 (1973); Wade v. Hunter, 336 U.S. 684; 69 S.Ct. 834.

Respondent submits that, under the circumstances, there should be a clear abuse of discretion here, or a clearly untenable result, before the grant of a writ of certiorari in this matter would be appropriate.

## CONCLUSION

WHEREFORE, for the foregoing reasons, Respondent respectfully requests that the petition for a writ of certiorari be DENIED.

Respectfully submitted,



WALTER POOKRUM
Counsel for Respondent
645 Griswold, Suite 384
Detroit, MI 48226
313/ 222-0323

May 30, 1995